

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

**NORTHWESTERN CORPORATION D/B/A
NORTHWESTERN ENERGY**

Employer,

and

Case 19-UC-261685

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 14**

Petitioner

DECISION AND ORDER CLARIFYING UNIT

International Brotherhood of Electrical Workers, Local 14 (Petitioner) filed the instant unit clarification petition on June 15, 2020, seeking to clarify an existing bargaining unit at Northwestern Corporation d/b/a Northwestern Energy (Employer) to include the classification of controller.

A videoconference hearing was held before a hearing officer on August 10. The hearing raised two issues: (1) whether or not the recently-created controller position essentially replaced the OMS dispatcher position and thus should be included in the unit through a unit clarification petition; and if so, (2) whether or not the newly-created controller position should be excluded from the unit as a managerial position within the meaning of the Act. The parties were given leave to file post-hearing briefs on the issues. Under Section 3(b) of the National Labor Relations Act (the Act), I have the authority to hear and decide this matter on behalf of the National Labor Relations Board (the Board).

Based upon the entire record in the proceeding, and after careful consideration of the arguments presented by the parties in their post-hearing briefs, the undersigned makes the following findings and conclusions.

BACKGROUND AND BARGAINING HISTORY

The Employer is a utility company that provides electricity and natural gas to residential and business customers in Montana, South Dakota, and Nebraska. It serves the six major cities in Montana as well as some rural territories, generating its own power and transmitting it

throughout the state. The Employer also has an unspecified number of gas production fields, and purchases gas from other companies as well.

There are eight divisions in the company: six in Montana located in the main cities of Sula, Butte, Helena, Great Falls, Bozeman and Billings; and two in South Dakota. There are also several districts within the divisions, with district managers reporting to their respective division manager.

The Petitioner and the Employer are parties to a collective-bargaining agreement (CBA) that was in effect from May 1, 2016 through April 30, 2020 and was subsequently extended by agreement of the parties through April 30, 2021. The original bargaining unit is described at Article 2 of the CBA.¹ Of the Employer's approximately 620 current employees, about 320 are represented by the Petitioner.

In about 2011, the Employer began to contemplate creating a central electrical distribution control center in Montana. Consequently, the positions of mobile workforce management dispatcher (mobile dispatchers) and OMS (Outage Management System) dispatcher were created by the Employer in about 2014, and the Employer purchased a product called InService designed to facilitate communication between its employees and customers. The position of mobile dispatcher was the functional component that connected the program to the Employer's representatives working in the field.² The OMS function was originally designed as part of the new InService program to deal with potential outage status or customer service issues that were reported to the OMS dispatchers by the customers so that they in turn could report them to field personnel and then update the repair progress. Either field personnel or managers could make decisions regarding how to deal with these outages, but not the OMS dispatchers who merely monitored and reported the outages and updated the outage map accordingly.³ At this time, mobile dispatchers and OMS dispatchers were part of the customer care department.

The Employer asserts that at the time it implemented the InService system, it anticipated that it was only a temporary system and that it would eventually be moving to an advance

¹ The original bargaining unit is described as follows: (A) All electrical classifications covered hereby (B) All gas classifications in Havre, Chester, Chinook, Harlem, Joplin, Inverness, Rudyard, Hingham, Gildford, Kremlin, Lewistown, Harlowton, Great Falls, Conrad, Choeau, Fairfield, Valier, Augusta, Columbus, Red Lodge, Bozeman, Livingston, Big Timber, Belgrade, Three Forks, and Manhattan, Montana, engaged in gas service and installation work; (C) All craft classifications historically covered in Generation facilities.

² Prior to the purchase of the InService system, the linemen in the field received their work orders via paper from their local management, and customer calls were taken at the local administrative level. Once the call center came on, the customer care or OMS dispatchers took customer calls and then connected those issues to the field employees.

³ The Employer explained that decisions on how to deal with smaller outages could be made by the field personnel themselves, while larger, more widespread or more complex outages required input by managers, supervisors, and/or engineers. These decisions would then be communicated back to the OMS dispatcher to update the customers on how the outage was being handled and how long it would last. Apparently, the InService system was able to automatically generate information and the reach out to customers regarding their status. The Employer also made an "outage map" that was updated by the OMS dispatchers available to customers to enable them to check their status on-line.

distribution management system (ADMS) with a centralized control center. Thus, according to the Employer, it considered the InService program to be an “interim product” that at some point would no longer be used and therefore OMS dispatchers would no longer be needed.⁴

The job description for OMS dispatcher is as follows:

The OMS dispatcher working in a Dispatching Center environment, responding to a variety of customer inquiries, system monitoring and mapping activities, as well as providing support and information for restoration efforts. The OMS dispatcher calls will be responsible [for] call monitoring with a priority goal of keeping accurate records, providing system status information, assisting in the safe restoration of service and customer satisfaction. The OMS dispatcher must work effectively within teams/work groups or with others to accomplish organizational goals. The OMS dispatcher must demonstrate strong adherence to accuracy, safe work practices/processes, customer service, and attendance.

In 2017, an election was held among employees in the customer care department holding the position of mobile workforce, mobile workforce management dispatcher, and OMS dispatcher to allow them to vote to become part of the larger bargaining unit of employees already represented by the Petitioner described above. As set forth in the Certification of Representative issued on November 21, 2017 in Case 19-RC-207108, mobile workforce management dispatchers and OMS dispatchers were certified as part of the original bargaining unit already represented by the Petitioner. There were approximately 14-16 employees in these positions at the time as part of the customer care department.

By Memorandum of Understanding (MOU) reached on March 18, 2019, the Petitioner and the Employer agreed the mobile dispatcher and OMS dispatcher classifications were covered by the provisions of the extant CBA as well as by certain additional provisions for each position negotiated between the parties. According to the Employer, a separate albeit identical provision was added for the OMS dispatchers because it was anticipated that the functions performed by the OMS dispatchers would no longer be needed once the mobile service function was fully operational and the transition from customer care to operations was complete with the implementation of ADMS. The Employer further asserts that it had advised the employees hired in 2014 for the positions of OMS dispatcher that this was an interim position, and that it further advised the Petitioner of this sometime in 2017.⁵ Nevertheless, the Employer recognized that it

⁴ The Employer asserts that the elimination of the OMS dispatcher was contemplated even before the implementation of the InService program, perhaps as early as 2011 or 2012. However, it was aware at that time that the mobile dispatcher functions would remain permanent.

⁵ During negotiations in December 20, 2018 leading up to the MOU regarding the mobile dispatchers and OMS dispatchers, the Employer’s notes indicate that it advised the Union that the functions of the OMS dispatchers did not provide any critical functions to systems performance, and that OMS could cease operations in the future and service to customers would not be affected. The Employer further discussed the eventual creation of the controller position, which was critical to the ADMS system and would provide better automated customer service than OMS, but the timing would depend upon future developments. The parties met again on February 6, 2019 to further discuss this and other related issues.

would be some time – possibly years – before an actual control center where centralized decisions throughout the company were made would actually be operational.

The Employer further explained that when the ADMS transition was complete, the centralized decisions regarding outage management would be made by a new classification of employees called controllers, and that ADMS would automate many of the errors in the obsolete OMS system.

Beginning in June 2019, the Employer conducted management workshops to create, with the assistance of an outside vendor, a “roadmap” to further explore the transition to a centralized control center through ADMS. Part of this transition, as mentioned above, was the creation and implementation of technology required to transition from distribution systems managed by eight different districts to a centralized control center. Part of this new technology was a SCADA system that would take data from all the various devices throughout the Employer’s distribution system and relay it back to a single control center. In anticipation of this centralized control center, the Employer began to explore what role the mobile dispatchers and OMS dispatchers could play, if any, under ADMS. Part of this transition would entail moving these employees from the customer care department to the DOC (Dispatch Operations Control Center) in operations.

As a further result of developing this “roadmap,” the Employer realized that it would have to begin to develop and train employees for positions that did not yet exist. Consequently, it began to examine the myriad of roles and responsibilities presently being done by eight different operating areas/districts and consolidate all of those functions into a centrally controlled distribution operation over the next few years. Thus, the “roadmap” to accomplish this four-phase transition initially called for the replacement of the existing OMS InService system as of approximately January 2020, and the qualification of SCADA controllers by the second quarter of 2021. It was further anticipated in this “roadmap” that supervisory control of distribution devices in ADMS would be effectuated by late 2021, assuming the controllers had been qualified by then. According to Phase 1 of this plan, the OMS system would be replaced by ADMS in January 2020. Phase 2 of the plan contemplates that the decisions currently being made by personnel in the eight districts would now be made by the controller. Thus, the controller would now approve the work to be done by the field personnel with regard to switching, outages, and the like.

Phase 3 of the transition plan contemplated that the distribution system would be controlled remotely from the centralized control center rather than by the field employees. Eventually, the Employer opined, perhaps all of the field work currently being performed by unit employees could be done remotely by electronic control. At Phase 3, the controllers would still be performing none of the work done by the OMS dispatchers. Finally, Phase 4 of the plan entailed completion of the transition including customer enhancements to be achieved by late 2021 or early 2022.

The transition "roadmap" described above also addressed the qualifications of the controllers and a foundation for developing a curriculum to develop and train those employees. With regard to the actual training of controllers, the Employer states that it is currently between Phase 1 and Phase 2 regarding analytical comprehension of the system.

In anticipation of the planned transition, the Employer began to move forward with hiring controllers to ensure that their training could be at such a stage that the switch from OMS to ADMS could stay on schedule, and posted the controller position internally in July 2019. The Employer initially targeted the existing OMS dispatchers for these new positions, and some of them began to take outside training in an effort to meet the controller qualifications.

The posted summary of the job description for controller is as follows:

A Distribution Operations control-Controller 1 will be responsible for managing and operating, through the use of software and an advanced control system, the utility distribution system across multiple regions of NorthWestern Energy's service territory. The controller will work in a control center environment, responding to utility system condition, while working with and/or directing field resources.

In contrast to the OMS dispatchers, who needed only a minimum of two years' experience in dispatching and basic electrical knowledge, the controllers were required to have an AA degree or professional education in a technical discipline in addition to a minimum of two years' experience. The Employer asserts that the controllers must use their discretion in terms of analyzing information in a "reactionary perspective" in order to guide field resources with minimal approval, which requires that they have a functional understanding of what the field personnel are doing. This is in contrast to the prior system where the field personnel and managers would make these decisions, and the OMS dispatchers would only monitor and record those decisions.

Four OMS dispatchers who completed the requisite outside training were eventually hired to fill the anticipated eight controller positions, and the balance were recruited from outside the company. The controllers worked in the same location as the former OMS dispatchers and maintained the same rolling schedules.

On October 13, 2019, after several delays in implementing the ADMS technology, the Employer wrote to Petitioner to update it on the progress of the transition from the extant OMS system to the ADMS system scheduled to transition in January 2020, and advised of the above hiring and the fact that the four controllers who were former OMS dispatchers would remain in that unit position through the transition, after which they and anyone hired thereafter as a controller would be non-represented employees.⁶

⁶ Inasmuch as OMS controller duties were still being performed during this extended transitional period, the Employer asked Petitioner if the employees that it had anticipatorily hired as controllers could perform OMS duties even though they were not in the bargaining unit, but the Union said they could not unless they paid dues while they

On January 30, 2020, the Employer sent a follow-up e-mail to the Petitioner advising that the ADMS software had gone live, and that all employees in the OMS dispatcher classifications who were now working as controllers would become non-represented controllers in distribution operations and that union dues would no longer be collected from them. Moreover, the Employer advised, all future controllers hired by the Employer would not be represented by Petitioner. The Petitioner responded by asking if there was no more OMS function being done by “people” because technology had eliminated those tasks, and the Employer confirmed this. Thus, at this point, the classification of OMS dispatcher essentially ceased to exist, and the Employer attempted to place the four remaining OMS dispatchers who did not become controllers in other positions within the company pursuant to Section 2.08 of the CBA (Technological Displacement).⁷

After this exchange, however, the Petitioner learned that the controllers were still performing the OMS work, and that their work has not been completely “automated” as the Employer had asserted. Consequently, in about May 2020, Petitioner filed a grievance under the CBA asserting that the Employer was attempting to remove bargaining unit work by changing title and tools and asking that the Employer recognize this work regardless of the title of those performing the work.⁸ The Employer responded that it believed the issue was not grievable, and suggested the Petitioner file the instant unit clarification petition, which it did.

At the time of this hearing, most of the work being performed by the controllers is substantially similar to that previously done by the OMS dispatchers, but it is anticipated that any similarities will decrease as the ADMS system continues to roll out over time through mid-2021. Eventually, most of the switching now manually performed by the field personnel will be electronically performed by the controllers once all the substation switches are automated.

Furthermore, at some point in the future the controllers will also be able to monitor voltage and electrical flows and operate devices remotely in the field from the operations center. The ADMS system, once fully functional, will also allow the controllers to write switching plans to redirect the flow of power, if needed. At the time of this hearing, the controllers themselves were not aware of what decision-making portion of their work will be done by them versus the ADMS system itself.

were performing OMS controller work. Thus, for the period October 2019 until January 2020, the controllers were technically “union.”

⁷ Section 2.08 of the CBA provides in relevant part that “when as a result of technological changes, new or revised job classifications are introduced which may result in the elimination of current bargaining unit positions, the company will endeavor to place the affected employees in alternate positions within the company, if available, and will assist them in acquiring the knowledge and skills necessary to qualify for those new or revised job classifications.

⁸ As with other representation matters, the Board will not defer a UC petition to an arbitrator’s decision, *Magna Corp.*, 261 NLRB 104, 105 fn. 2 (1982), and cases cited therein. See also *Advanced Architectural Metals, Inc.*, 347 NLRB 1279 (2006).

THE POSITIONS OF THE PARTIES

The Petitioner's Position

The Petitioner concedes that the Employer has long planned to implement technology upgrades and devise new processes and train controllers to understand and use these new processes. However, the Petitioner argues, the final implementation of these upgrades and processes is still sometime in the future. In the meantime, it is undisputed that during this extended transition period, the controllers are at present doing the same jobs and performing the same functions as the OMS dispatchers did previously. The only difference, according to the Petitioner, is that the controllers are being trained to have more electrical and switching knowledge and to use a different computer program. Moreover, according to the Petitioner, because the actual functions of the controllers have yet to be implemented, their eventual duties are speculative at this point.

Therefore, the Petitioner argues, the evidence shows that at this point in time the function and work of the controllers has not changed significantly from that of the OMS dispatchers. Although the Employer asserts that changes will occur some time in the future, there is still considerable uncertainty as to when, how, or even if these changes will occur. The Petitioner notes that the Board has long based unit-determination decisions on present duties and interests, and not future assignments.⁹

Thus, the Petitioner asserts, the controllers merely replaced the OMS dispatchers, and the Employer created a new non-unit classification of employees that is currently performing the work previously performed by employees in the bargaining unit. Even if all the Employer's future plans of control centralization are realized at some time in the future, the controllers will still be doing much of the work previously performed by the OMS dispatchers, including monitoring and mapping outages (by computer instead of manually), monitoring and mapping switching plans to bypass outages; and communicating and directing field personnel to trouble spots. In this regard, the controllers will still not direct field personnel on how to perform their jobs.

Moreover, the Petitioner asserts that its petition is both timely and appropriate. Although the Board generally refuses to clarify a unit during the pendency of a CBA where the objection is to change the composition of a contractually agreed-upon unit by inclusion or exclusion of employees, that is not the situation in the instant petition. Rather, if a new classification is performing the same basic function as the unit employees have historically performed, the Board has held that the new classification is properly viewed as remaining in the unit rather than being added by accretion.¹⁰ In the instant case, the only changes to the work being performed are the

⁹ *Heckett Engineering Co.*, 117 NLRB 1395, 1398 (1957).

¹⁰ *Premcor, Inc.*, 333 NLRB 1365 (2001).

titles of the employees and new computer software used to accomplish essentially the same objectives.

Finally, the Petitioner argues that the Employer has failed to meet its burden of showing that the controllers are managerial employees and should therefore be excluded from the unit. In this regard, the Board has held that the question of whether particular employees are “managerial” must be based on the employees’ actual job responsibilities, authority, and relationship to management.¹¹ Specifically, the party asserting managerial status must prove, through specific evidence or testimony, the nature and number of decisions made by putative managers and cannot rely on mere conclusory assertions.¹² In this regard, the Petitioner argues, the Employer has failed to educe any specific evidence that the controllers presently formulate, determine, and/or effectuate policies on behalf of the Employer, or that they may do so in the future. Rather, the record shows that the new ADMS computer programs – and not the controllers – will actually be doing the “managerial” work of directing field employees and this will not render the controllers supervisors or managers within the meaning of the Act.

Thus, despite the Employer’s contention that the controllers will eventually have some discretion to make unspecified managerial decisions and use judgement on how to implement those decisions, there is no evidence that this will actually happen in the future in the manner that the Employer suggests or perhaps in any manner. As such, according to the Petitioner, the Employer has failed to meet its burden of showing that these employees should be excluded from the unit as managers.

The Employer’s Position

The Employer argues that, based on a review of the multi-year transition process that began several years ago and is not yet completed, that it would not be appropriate for the controllers to be part of the unit. When the complex phased transition towards centralizing control of decision making to improve operations is fully realized, the controllers are meant to and will be making management-level decisions regarding transmission issues. At that time, according to the Employer, they will be making decisions that were historically made by managers, supervisors, and engineers in the field. The Employer concedes that at the present time, the controllers are still performing some functions previously performed by the OMS dispatchers while they are receiving on-going training to eventually take over centralized control of decision making.

The Employer confirms that it is now between Phases 1 and 2 of its 4-phase transition plan to ADMS, and that presently the controllers see very little difference between what they did as OMS dispatchers and what they currently do, although the differences and distinctions will

¹¹ *Montefiore Hospital & Medical Center*, 261 NLRB 569, 572 fn.17 (1982).

¹² *Pacific Lutheran University*, 361 NLRB 1404, 1421 (2014)

continue to increase as the transition proceeds.¹³ According to the Employer, the controllers are preparing to “go live” in the future by learning the new system and the decisions that they may have to eventually make. These decisions may ultimately include creating switching plans – a task previously performed by non-unit engineers and managers – and directing certain work of other unit field employees with respect to certain outage responses. The Employer predicts that eventually, field employees may be directed by the controllers, who will evaluate information and accordingly “turn that information into action.” The transition is currently projected to be completed by mid-2021.

The Employer further notes that the OMS dispatchers were not crucial to the OMS operation, since they only received and recorded information received from the field. In contrast, the Controllers will exercise independent discretion with regard to dealing with outages. Although they will not be making company policy *per se*, they will be responsible for assuring that the actions of others they are directly adhere to the policies of the company.

Based on the foregoing, the Employer argues that the controller position is distinct from and not a replacement for the OMS dispatcher position, because the latter were not required to understand power outages but just monitor and report them. In contrast, the controllers will eventually evolve into exercising discretion and making decisions. Consequently, the controllers are subjected to more rigorous training and additional education to complete these tasks. Eventually, the Employer asserts, the controllers will control the distribution network and direct employees in the field as part of a centralized control center. Thus, according to the Employer, the duties that will eventually be performed by the controllers will differ significantly from those of the former OMS dispatchers, and therefore they should not be included in the extant unit.

Moreover, the Employer urges that inasmuch as the decisions that will be made by controllers in the future go to the core of the company’s business to deliver electricity to its customers, they are aligned with management and therefore should be excluded from the unit.¹⁴

DISCUSSION

The Board’s express authority under Section 9(c)(1) of the Act to issue certifications carries with it the implied authority to police such certifications and to clarify them as a means of effectuating the policies of the Act. Under Section 102.60(b) of the Board’s Rules and

¹³ The Employer misstates testimony from a former OMS dispatcher who became a controller when it asserts that she stated that when she was an OMS dispatcher, 60% of her workday was spent doing mobile dispatch work and only 40% was OMS work. This employee testified that this was the case only because of a shortage of mobile dispatchers at the time that caused the OMS dispatchers to fill in for them. Thus, the Employer’s argument that as a controller, she does not currently perform any mobile work is not relevant.

¹⁴ In further support of its contention that the controllers should not be part of the existing unit, the Employer asserts that the OMS dispatcher position was temporary pending the transition to controller, and that the OMS dispatchers were aware of this, as was the Petitioner after the certification of the existing unit. This fact, however, does not rebut the undisputed fact that the controllers presently, and for some unpredictable time in the future, continue to perform the same work and function as that performed by the OMS dispatchers.

Regulations, a party may file a petition for clarification of a bargaining unit where there is a certified or currently recognized bargaining representative and no question concerning representation exists. In *Union Electric Co.*, 217NLRB 666, 667 (1975), the Board stated:

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category—excluded or included—that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

When determining whether unit clarification proceedings are appropriate, the Board also considers the timing of the filing of the petition. With few exceptions, the Board refuses to clarify a unit in the middle of a contract. *Wallace-Murray*, 192 NLRB 1090 (1971) (holding that it would be disruptive to the bargaining relationship to clarify a unit mid-term where the contract clearly defines the unit).¹⁵

However, if a new classification is performing the same basic function as unit employees have historically performed, the new classification is properly “viewed as remaining in the unit rather than being added to the unit by accretion.” *Premcor, Inc.*, 333 NLRB 1365, 1366 (2001).¹⁶ Similarly, where an employer has created a new classification that performed the same type of work performed by unit employees at the same location, and the new classification was arguably encompassed by the unit description, the Board has found that the new classification simply remained or belonged in the unit without the need for an accretion analysis, which would require demonstrating a showing of interest between the employees in the new classification and the extant unit.. *Developmental Disabilities Institute*, 334 NLRB 1166 (2001),

The threshold issue is whether the new classification of controllers performs the same type of work as the former OMS dispatchers so that they may be considered part of the extant

¹⁵ The Petitioner correctly notes that the Employer did not object to the timing of the petition, and in fact suggested that the Petitioner file it.

¹⁶ See also *Developmental Disabilities Institute*, 334 NLRB 1166 (2001). Compare *AT Wall, Inc.*, 361 NLRB No. 62, slip op. at 3–4 (2014); *Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co.*, 367 NLRB No. 80 (2019).

unit without the need to show a community of interest. The Employer asserts that they do not, since the OMS dispatchers monitored and recorded actions taken as a result of decisions made by others – primarily managers, supervisors, and engineers in the field throughout various divisions – and, in contrast, the new Controllers eventually will be the ones making those operational decisions from a centralized location by virtue of their extensive education and training.

The Petitioner argues that even when and if the transition to the new technology is complete, that the controllers' work will essentially replace the work currently being done by the OMS Dispatchers along with some additional tasks performed by the new technology. Therefore, the Petitioner argues, the controllers will continue to perform the same function as the OMS Dispatchers, that is, communicating with people in the field albeit through an automated system.

Both parties concede that the Employer is still in the early phases of a multi-year transition to a centralized control system where the controllers will be fully trained and the new system fully implemented. Barring unforeseen complications, current estimates are that this transition will not be fully actualized until the end of 2021 or early 2022 – more than a year from now.

In the interim, it is undisputed that the controllers are currently doing the same work previously done by the OMS dispatchers. Even though the Employer asserts that this will cease to be the case some time in the future, the exact duties of the controllers even at that time remain not fully formed and speculative. Moreover, it is unclear what portion of the new duties will be performed by the automated computer system or what those duties will be.¹⁷ As the Petitioner has argued, the Board has long held that in unit-determination decisions, present duties and interests are determinative, not future assignments. *Heckett Engineering, supra.*; *Hampton Roads Maritime Assoc.*, 178 NLRB 263, 264 fn.5 (1969).

Moreover, the eight newly created controller positions directly replaced the eight OMS dispatchers and continue to serve the same purpose with regard to the monitoring and reporting of outages.¹⁸ Thus, it would not change the existing unit by allowing them to remain.

The Employer also asserts that the controllers should be excluded from the unit as managerial employees. Unlike supervisors, managers are not expressly excluded from coverage of the Act. *Yeshiva Univ.*, 444 U.S. 672, 682 (1980). Generally, managerial employees are defined as those who “formulate and effectuate management policies by expressing and making

¹⁷ The job description for the controllers that the Employer provided appear to be largely aspirational at this point, since no evidence was presented that any of the controllers currently perform those duties. To the contrary, a former OMS dispatcher who became a controller testified that her work remained unchanged from what it had been before. See *NLRB v. Louisville Gas & Electric*, 760 F.2d 99 (6th Cir. 1985), enfg. 268 NLRB No. 149 (1984) (Board clarified unit too included newly-created position that unit employees had been promoted into but continued to perform substantially the same work as before).

¹⁸ No party seems to suggest that there is no longer any need to monitor outages and communicate to the customers or that this work has ceased to exist. Rather, the question is who is doing this work and how.

operative the decisions of the employer.” *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 283 (1974). These employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. *Id.* at 286-287. Although the Board has established no firm criteria for determining when an employee is so aligned, “normally, an employee may be excluded as managerial only if he represents management interests by taking or recommending disciplinary actions that effectively control or implement employer policy.” *Id.*

In the instant case, there is no evidence that controller’s exercise of discretionary authority regarding responding to outages on behalf of the Employer would cause them to divide their loyalty between the Employer and the Petitioner. *Id.* at 688. Moreover, the Court noted that the Board has recognized that employees whose decision making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. *Id.* at 690.

Not only do the eventual duties of the controllers not cause any divided loyalty, the record shows that any discretionary authority that might be exercised by the controllers exists by virtue of their technical training and is limited to instructing field personnel and others how to deal with certain outages and rerouting power. No party asserts that the controllers will be able to make decisions attributed to supervisors under Section 2(11) of the Act.

The Board has emphasized that the party seeking to exclude employees as managerial has the burden of coming forward with evidence necessary to establish the exclusion. *See e.g., Montefiore Hospital & Medical Center*, 261 NLRB 569, 572 fn. 17 (1982). “[T]he question whether particular employees are ‘managerial’ must be answered in terms of the employees’ actual job responsibilities, authority, and relationship to management.” *Id.* at 290 n.19. “[T]he party asserting managerial status must prove actual - rather than mere paper - authority.” *Pacific Lutheran University*, 361 NLRB 1404, 1421 (2014). The Board has further emphasized the need for “specific evidence or testimony regarding the nature and number” of decisions made by putative managers and subsequent review of those decisions “rather than mere conclusory assertions.” *Id.* When considering exclusions from the Act’s protections, any lack of evidence in the record is construed against the party asserting exclusion. *Williamette Industries, Inc.*, 336 NLRB 743 (2001).

Based upon a review of the entire record in this case, as well as the position statements submitted by the parties, I find that the controllers are currently performing unit work formerly done by the OMS dispatchers and should therefore remain in the unit.¹⁹

¹⁹ As discussed above, inasmuch as the controllers are performing the same basic function that unit employees have historically performed, this classification is properly “viewed as remaining in the unit rather than being added to the unit by accretion.” *Pemcor*, *supra* at 1366. Based upon this conclusion, I find that a showing that these employees share a community of interest with unit employees is not required.

CONCLUSION AND FINDINGS

1. The parties stipulated, and I so find, that the Employer is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.²⁰
2. The parties stipulated, and I so find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) and Sections 2(6) and (7) of the Act.

Based on the foregoing, the entire record, and the post-hearing briefs filed by the parties, **IT IS HEREBY ORDERED** that the current certified and recognized bargaining unit is hereby clarified to include the classification of controllers. Accordingly, the clarified unit is hereby described as follows:

Included: All full-time Mobile Workforce Management Dispatchers, Outage Management System Dispatchers, and Controllers employed by the Employer at its facility in Butte, Montana

Excluded: All other employees, confidential employees, and guards and supervisors as defined in the Act.

RIGHT TO REQUEST FOR REVIEW

Pursuant to Section 102.67 (c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67 (d) and (e) of the Board's Rules and Regulations and must be filed by **October 7, 2020**.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number and follow the detailed instructions.²¹ A party

²⁰ The parties stipulated, and I so find, that the Employer is a Delaware corporation with an office and place of business in Butte, Montana, and is a provider of electricity and natural gas to residential and business customers in Montana, South Dakota, and Nebraska. Within the last 12 months, a representative period, the Employer derived gross revenues in excess of \$250,000, and, during that same period, purchased and received goods valued in excess of \$50,000 directly from outside the State of Montana.

²¹ On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of

filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Seattle, Washington on September 23, 2020.

Ronald K. Hooks

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documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden.